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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term
1940

ACME FREIGHT LINES, INC.,
A Florida corporation,
Petitioner

vs.

J. M. LEE, as State Comptroller
of the State of Florida.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

To The Honorable The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

SUMMARY STATEMENT OF MATTER INVOLVED

This case challenges the validity under the Federal Constitution of Chapter 19446, Laws of Florida, Acts of 1939 (commonly and herein referred to as the Diesel Act), as it applies to Petitioner. It is the first test of that law to reach this Court.

The Diesel Act imposes an excise tax of seven cents per gallon upon the *use* of fuel or motor vehicle fuel only when such fuel is used in an engine to create power to

propel a motor vehicle over the public highways of Florida (Diesel Act, Sec. 2, Appendix p. 13). It defines "fuel" or "motor vehicle fuel" to be the combustible gases or liquids used in an engine to create power to propel a vehicle on the Florida highways *other than* the fuels subject to Chapter 15659, Laws of Florida, Acts of 1931, as amended, namely the act taxing the *sale* or *storage* in Florida of gasoline and kerosene. (Diesel Act, Sec. 1, Appendix p. 12). Said Act defines and requires a "user" of such fuel to file an application for and secure a license as a user, with a separate license card for each motor vehicle using same. A $5.00 fee is exacted for the filing, and a $1.00 fee for each separate license (Said Act, Sec. 6, Appendix p. 17). Grave civil and criminal penalties are provided for any violation.

Petitioner is a certificated common carrier of property for compensation by motor vehicle, operating into and from Florida under authority from the Interstate Commerce Commission obtained pursuant to the Motor Carrier Act, 1935 (49 U. S. C. A., Section 301). *It so transports such property solely and exclusively in interstate commerce, doing no intrastate business in Florida.* It operates seven motor vehicles powered by diesel engines which burn diesel oil, thereby being a user of fuel as defined above.

Petitioner filed its Bill of Complaint against J. M. Lee, State Comptroller of Florida, seeking an injunction to restrain collection of the tax (Tr. 1-23). The propriety of this remedy and procedure is recognized. The grounds here relied upon were presented by said complaint (Tr. 16). After due notice the Circuit Court refused an injunction and dismissed the bill (Tr. 31-32). On appeal to the Supreme Court of Florida, this action was affirmed by

an opinion rendered July 5, 1940, (Tr. 41-45), which petitioner seeks to review. Rehearing (Tr. 46-48) was denied July 31, 1940 (Tr. 50).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. Petitioner uses the fuel to furnish power to move property exclusively in interstate commerce. The use of the fuel is essential to the conduct of Petitioner's business. The Diesel Act imposes an excise gallonage tax upon such use. Therefore, as it applies to Petitioner, the Diesel Act clearly and decisively violates Article 1, Section 8, of the Federal Constitution in that it imposes a direct burden upon an essential instrumentality of interstate commerce.

James R. Helson, etc., vs. Commonwealth of Kentucky, 279 U. S. 245, 73 L. ed. 683;

Bingaman vs. Golden Eagle Western Lines, Inc., 297 U. S. 626, 80 L. ed. 928 (See: *Bowman vs. Continental Oil Co.*, 256 U. S. 642, 65 L. ed. 1139; *George E. Breece Lumber Company, et al., vs. Gilberto Mirabal, etc.* 34 N. M. 643, 287 Pac. 699, 84 A. L. R. 827; *United States Airways, Inc. vs. Shaw, et al*, 43 F. (2nd) 148; *Mid Continental Express Corporation vs. Lujan*, 47 F. (2nd) 266);

Askren vs. Continental Oil Co., 252 U. S. 444, 64 L. ed. 654;

Eastern Air Transport, Inc. vs. South Carolina Tax Commission, 285 U. S. 117, 76 L. ed. 673.

2. The Supreme Court of Florida upheld the validity of the Diesel Act upon the nebulous theory that it was

intended as compensation for the use of the public roads. That Court's opinion is amazingly but candidly devoid of any logic, argument or reason to support such view (Tr. 41-54). Chief Justice Terrell dissented, but withdrew his opinion before publication. We quote it (Appendix pp. 8-11) because of its obvious soundness and clear statement that the Diesel Act imposes an excise tax, pure and simple, upon the use of fuel and is not a charge exacted for the use of the highways.

This Court is not bound by the Florida Supreme Court's unwarranted assumption that the Diesel Act was intended as compensation for the use of the roads. Petitioner's rights are protected by the Federal Constitution, and the tax challenged is a substantial invasion of those rights. *This Court has the power and the duty to protect them.*

> *Schuylkill Trust Company vs. Commonwealth of Pennsylvania,* 296 U. S. 113, 80 L. ed. 91 (97);
>
> *MacAllen Company vs. Commonwealth of Massachusetts,* 297 U. S. 620, 73 L. ed. 874.

The conclusion is inescapable that the Diesel Act is not compensatory for the use of the roads. Petitioner pays mileage taxes to the State of Florida each month in large sums (Tr. 5) as required by Chapter 14764, Laws of Florida, Acts of 1931. That Act provides:

> "*All mileage taxes* prescribed by this Act and all such taxes imposed on auto transportation companies using the public highways in the transportation of persons or property for compensation

shall be deemed to be compensatory for the use of the public highways of this state by auto transportation companies taxed under the provisions of this Act and *as a fair contribution to the cost of constructing and maintaining the public highways of this state* * * * *".

(Section 26, said Act, Emphasis supplied.)

Thus Florida has one act *expressly* exacting a charge as compensation for the use of the highways. Petitioner complies with and does not question that act. By its plain terms, however, the Diesel Act does not even purport to impose such a charge or toll. It says absolutely nothing about such things, and professes to be an excise tax on the use of fuel.

This Court has said:

"But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity",

and

"The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting paragraph 4 of the 1927 Act with those statutes which admittedly provide for defraying the cost of constructing and maintaining highways and regulating traffic thereon".

Interstate Transit, Inc. vs. Lindsey, 283 U. S. 183, 75 L. ed. 953.

Thus, the single and mere fact that the Diesel Act falls upon one who uses the highways does not give it presump-

tive validity. Further, the conclusion that it is an invalid excise on the use of fuel is confirmed by contrasting it with Chapter 14764, supra, which admittedly exacts "a fair contribution to the cost of constructing and maintaining the public highways" of Florida.

There is an utter, complete and absolute failure to affirmatively show that the Diesel Act exacts a charge as compensation for their use or to pay the cost of policing or maintaining the highways.

Dixie Ohio Express Company vs. State Revenue Commission of Georgia, 306 U. S. 72, 83 L. ed. 495.

3. The following illustration demonstrates that the Diesel Act violates the Fourteenth Amendment, Section 1, of the Federal Constitution: Petitioner paid to the State of Florida $3,187.37 as "mileage taxes" in 1938; $2,126.17 as such taxes in the first seven months of 1939, and will continue to pay them each month (Tr. 5). Such mileage taxes "shall be deemed to be compensatory for the use of the public highways" * * * and "as a fair contribution to the cost of constructing and maintaining the public highways". (Sec. 26, Chapter 14764, Acts of 1931, ante p. 5). St. Johns River Line, a common carrier by water, and the Florida East Coast Railway, a common carrier by rail, both *direct competitors of Petitioner*, do *not* pay such mileage taxes (Tr. 13). Thus Petitioner, using the roads and paying the mileage tax for such use bears its share of highway expense and stands on an equal basis with the other carriers. All three use the same fuel to carry interstate commerce (Tr. 13), but *only* Petitioner is required under the Diesel Act to pay the tax. The unfairness to, discrimination against and lack of com-

pensatory benefits to Petitioner are apparent. Beyond cavil, the Diesel Act denies plaintiff the equal protection of the laws.

WHEREFORE, Petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Florida, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the records and proceedings herein; and that the decree of the Supreme Court of the State of Florida be reversed by this Honorable Court, and Petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully,

C. D. RINEHART

FRANCIS P. CONROY

Counsel for Petitioner